

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
Joint Application by BellSouth)	
Corporation, BellSouth)	
Telecommunications, Inc. and)	WC Docket No. 02-150
BellSouth Long Distance, Inc.)	
For Provision of In-Regions)	
InterLATA Services in Alabama,)	
Kentucky, Mississippi, North)	
Carolina, and South Carolina)	

REPLY COMMENTS OF BIRCH TELECOM OF THE SOUTH, INC.

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August 5, 2002

REPLY COMMENTS OF BIRCH TELECOM OF THE SOUTH, INC.

Comes now Birch Telecom of the South, Inc. and files these reply comments in the above-captioned proceeding. In addition to the consideration of the comments submitted herein, Birch respectfully requests that its initial comments filed in this proceeding be incorporated by reference as the problems identified by Birch through those comments persist, and continue to deny Birch and other CLECs a meaningful opportunity to compete throughout the BellSouth region.

UNE Pricing Concerns

Birch has recently discovered another BellSouth policy that must be modified prior to this Commission granting BellSouth 271 relief for the five states in the instant Application. For the past several months, Birch has been re-negotiating its nine-state comprehensive Interconnection Agreement (“ICA”) with BellSouth. Through the course of those negotiations, Birch discovered that many of the UNE rates were not the latest available in a particular state or were not those being offered as part of BellSouth’s Statement of Generally Available Terms and Conditions (“SGAT”). For example, with respect to Daily Usage Feed (“DUF”) rates, about which there has been much discussion in the instant proceeding, Birch’s analysis revealed that in several instances the DUF rates proposed to Birch were much higher than the same element included within the state SGAT or higher than the alleged “cost-based” rate introduced by BellSouth in a state costing proceeding – in certain cases as much as twenty times higher.

As the Commission is aware, BellSouth has “voluntarily” reduced some of its DUF rates contained within state SGATs, presumably as a result of CLECs’ comments regarding DUF rates and due to this Commission’s investigation of them. The practical implication of

this voluntary reduction, from Birch's perspective, is that only parties who choose to take BellSouth's SGATs, state by state, will be permitted by BellSouth to avail themselves of these lower rates. In fact, on July 10, 2002, Birch provided to BellSouth a state by state analysis of DUF rates proposed to Birch by BellSouth, versus the SGAT proposed rates, versus the rates proposed by BellSouth in various state costing proceedings.¹ On August 1 Birch received BellSouth's response to Birch's analysis indicating that BellSouth will only allow Birch to avail itself of UNE rates that have been ordered by a state commission.² Any "cost-based" rate offered through a state SGAT, or any voluntary reductions of such rates, therefore, are not available to Birch unless Birch discards all of its efforts to re-negotiate its new ICA and elects to take BellSouth's SGATs on a state by state basis. Certainly, this would undo all efforts expended to implement the comprehensive nine-state agreement under which Birch has operated in the BellSouth region since January 2001.

BellSouth's response to Birch's inquiry on DUF rates, though not surprising, is disappointing. In fact, it is indicative of BellSouth's abuse of its bargaining power within the scope of Interconnection Agreement negotiations with CLECs. Although it would be logical to deem one set of "cost-based" rates per state, of which CLECs can avail themselves through their ICAs or amendments thereto, BellSouth apparently deals within the realm of three possible sets of rates per state -- and Birch can only avail itself of those proposed specifically to Birch by BellSouth, or those which Birch reminds BellSouth have been ordered by a state commission.³ BellSouth has flatly refused to automatically update state

¹ Attached hereto as "Attachment A" is a DUF comparison memorandum prepared by Birch Regulatory Counsel and provided to the BellSouth ICA negotiator.

² Birch would include that electronic mail transmission from BellSouth's ICA negotiator, but such transmission was deemed "confidential," although provided by a non-attorney.

³ BellSouth has also recently proposed a new provision for Birch's General Terms and Conditions section that would preclude Birch from obtaining a true-up of non cost-based UNE rates paid to BellSouth

commission-ordered UNE rates, but instead requires CLECs to notify BellSouth of its intent to “elect” the newly ordered rates, following a period of several weeks to purportedly update BellSouth’s UNE rate tables. Surely the Commission would agree that the purpose of establishing cost-based rates would be for CLECs to purchase UNEs from BellSouth in accord with federal and state law. Moreover, where BellSouth finds that it can “voluntarily” reduce rates for purposes of a 271 proceeding, CLECs should be able to purchase UNEs from BellSouth at those reduced rates, regardless of the ICA vehicle utilized by a particular CLEC.

Any regulator who believes that Birch has any power to truly negotiate rates with BellSouth, within the scope of its current ICA negotiations, must only look to the DUF example presented herein for proof that Birch lacks any bargaining power when it comes to benefiting from the full gamut of cost-based UNE rates offered by BellSouth. This policy by BellSouth undermines the process by which cost-based UNE rates are determined, with the intent that CLECs can actually avail themselves of such rates. Birch implores this Commission to require BellSouth to offer the same “cost-based” UNE rates available through BellSouth’s SGATs to CLECs who choose to enter into ICAs other than SGATs with BellSouth – before the instant Application is granted.

Although DUF rates are not the only BellSouth pricing concern of Birch, BellSouth’s overarching policy to disallow CLECs from receiving all of BellSouth’s cost-based UNE rates through any agreement other than an SGAT is alarming. It is yet another policy over which BellSouth has complete control but refuses to modify and implement a policy consistent with the principles of the Federal Act, without a regulatory mandate to do so. Birch requests that the Commission require BellSouth to modify its policy regarding UNE

by Birch when any commission-ordered UNE rates were effective in a state but not yet implemented for

rates as a condition of approval of the instant Application. The various BellSouth's internal policies and procedures, and their effect on CLECs' meaningful opportunity to compete in BellSouth's region are a glimpse into the plight endured by CLECS on their way to a Pyrrhic victory. It will not matter if CLECs still remain when it becomes time to analyze the existence of the competitive telecommunications industry because the bulk of their resources and energy will have been depleted in attempting to convince the regulators that the anti-competitive policies, practices and behaviors of the BellSouth's of the world must be corrected in order for any semblance of competition to be maintained.

WHEREFORE, Birch Telecom of the South, Inc. respectfully requests that the Commission consider the comments herein in its determination of this proceeding.

Respectfully submitted,

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any reason reason, including BellSouth's failure to update its UNE rate tables.

